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NO.

in the

Supreme Court

of the

United States

October Term, 1982

MICHAEL EUGENE WEECH and
RICHARD VERNON WRIGHT,
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE TO THE DEFENSE FAVORABLE INFORMATION AVAILABLE ONLY TO THE GOVERNMENT VIOLATES THE MANDATE OF *BRADY v. MARYLAND*, AND DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS, WHERE THE THEORY OF DEFENSE WAS THAT DEFENDANTS WERE BROUGHT ABOARD THE BOAT TO MAKE REPAIRS, AND THE WITHHELD EVIDENCE WOULD SHOW THAT THERE WERE OIL CANS AND TOOLS ON DECK, THAT THE VESSEL HAD TO BE TOWED INTO DOCK AND THERE WERE THREE MEN SEEN RUNNING FROM ANOTHER BOAT, WHO COULD HAVE SUPPORTED THE THEORY OF DEFENSE?

II.

WHETHER THE FAILURE TO ALLOW A PHONE CALL IN PRIVACY TO DEFENDANTS WHO WERE ARRESTED AND HELD INCOMMUNICADO FOR EIGHT HOURS, PREVENTED THEM FROM MAKING MEANINGFUL INITIAL CONTACT WITH THEIR FAMILIES OR ATTORNEYS, IN VIOLATION OF THEIR FIRST, FOURTH, FIFTH AND SIXTH AMENDMENT RIGHTS?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Michael Eugene Weech and Richard Vernon Wright, Defendants/Appellants below, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals, Eleventh Circuit, entered in this proceeding on March 1, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, reproduced and attached hereto as Appendix A, is unreported. The judgment and sentence of the trial court with respect to Weech is reproduced and attached hereto as Appendix B and the judgment and sentence in respect to Wright is reproduced and attached as Appendix C.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals, Eleventh Circuit, was entered on March 1, 1983. Weech and Wright timely filed a Petition For Rehearing by the panel which was denied by order of April 11, 1983. The petition is reproduced and attached hereto as Appendix D, and the order denying rehearing and issuing the mandate is reproduced and attached hereto as Appendix E. This Petition For a Writ of Certiorari was filed within sixty days of entry of the order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254, Rules 17.1(a)and (c) and Rule 20, Supreme Court Rules.

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT

Freedom of religion, speech and press; peaceful assembliage; petition of grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of greivances.

FOURTH AMENDMENT

Searches and seizures

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

On January 28, 1982, Michael Eugene Weech and Richard Vernon Wright were charged in a two count indictment with conspiracy to possess with intent to distribute and with possession with intent to distribute more than 1,000 pounds of marijuana. Numerous defense motions were timely filed, including a motion for discovery and a motion to compel compliance with the court's standing discovery order. Less than a week before trial, the magistrate had not yet ruled on the defense motions, nor had the government provided the required discovery. Nonetheless, the trial judge denied defendants' sworn motion for a continuance. Jury trial commenced on March 15, 1982, and resulted in jury verdicts of guilty for both defendants on both counts.

Wright was sentenced to two concurrent four year terms of imprisonment with a special parole term of three years on Count II. Weech was sentenced on both counts to treatment and supervision as a youthful offender under 18 U.S.C. §5010(b). See Appendix B and C.

Weech and Wright appealed to the Eleventh Circuit Court of Appeals. On March 1, 1983, the Eleventh circuit rendered an opinion affirming the convictions. (Appendix A.) Weech and Wright timely filed a Petition For Rehearing by panel (Appendix D), which was denied on April 11, 1983 (Appendix E). These proceedings ensued.

The Record reflects that on January 21, 1982, the Coast Guard boarded and seized the forty-eight foot fishing vessel HAPPY DAYS, and arrested Weech and

Wright who were on board. There were 205 bales of marijuana inside the boat. When the Coast Guard first saw the HAPPY DAYS Wright and Weech were on the flying bridge. Wright was driving.

Some two miles away, and shortly before the Coast Guard saw the HAPPY DAYS a 20-foot Cigarette speed boat was found with 84 bales of marijuana, but no people on board. A "private source" reported that he saw the boat on a sandbar, and upon approaching to assist three men ran away. The identity of the person who phoned this report to the Coast Guard was never revealed to the defense.

Richard Wright is a 34 year old marine mechanic who resides in Fort Myers, Florida with his wife and two children. Since 1976, Wright has been servicing boats from Key West to Jacksonville, Atlanta and the Carolina Coast. In January of 1982, business was slow, so Wright went looking for "outside labor contract work" at various marinas. He drove to Fort Lauderdale and went to several marinas, but could not find work. The next day he ran into Michael Weech, a 19 year old apprentice electrician living with his parents in Hollywood, Florida, whom he had known casually for about a year and a half.

Wright told Weech he was going down to the Keys to look for work and to go fishing. Weech went along. Wright went to the local marinas but no jobs were available, so he took out his fishing gear and headed for a fishing canal. They spent the night on the shore.

Just after daybreak, a blue Cigarette speedboat came through the cut. A Latin man on board asked

Wright if the marina was open yet. Wright said it probably would not open until 9:00. The man said his boat had broken down and he needed a mechanic. When Wright said he was a mechanic, the man offered $500.00 if he would go out and fix the boat. Wright woke up Weech and he wanted to go along. They got into the Cigarette, headed in a southwesterly direction for about 35 minutes. They came up to the HAPPY DAYS, and boarded it. Wright brought his tool box. Two other men were on board. The Latin man (known only as George), and the two others opened the cabin doors and transferred packages from the Sport Fisherman onto the Cigarette. George said he was going to shore, and if Wright got the boat going he should call on the radio. The three strangers left on the Cigarette at about 9:00 a.m. and were not seen again.

According to Wright, the HAPPY DAYS was in a terrible state of repair. He worked on it and Weech assisted him. Wright said he had to clear out the fuel systems and add 12-14 quarts of oil. At around 10:30, Wright got the boat running and did a test drive. He noticed that the Coast Guard passed by three or four times. Finally, the Coast Guard Cutter put its blue light on and stopped the HAPPY DAYS. Wright and Weech could produce no documentation for the vessel. They were taken into custody at around 10:40 a.m.

Weech tried to explain about being brought out in the speedboat, but the Coast Guard officer told Weech that he did not want to hear it, and to wait until he spoke with his attorney. Weech asked to make a phone call which was not allowed.

Wright and Weech were placed on the cutter, handcuffed on the back of the deck with two armed guards, and taken to the Coast Guard station at Islamorada at around 11:00 a.m., where they were kept all day. Wright asked to use the phone as soon as they arrived at Islamorada, but was not allowed to make a call until hours later.

Wright was handcuffed out in the sun until about 3:30 that afternoon. He said that he wanted a lawyer, but in spite of several requests to use the phone, and the fact that there were many telephones at the station, he was not permitted to use a telephone. Likewise, Weech observed four or five offices with telephones in them, and asked all day (10 or 15 times) to make a call.

After the contraband was unloaded from the HAPPY DAYS, the Coast Guard tried to drive it away, but the engines failed and it had to be towed away. A tool box and oil cans were observed on the deck of the HAPPY DAYS.

After the arrest, D.E.A. Special Agent Gene Francar was called to the Coast Guard base at Islamorada. When he arrived Wright and Weech again made several requests for telephone calls. Hours later, Francar said they could make a collect call from a pay telephone. It was already after dark when they were allowed to call. Their statements made on the phone were used against them at trial.

During trial, an evidentiary hearing was held on the defendants' motion to suppress their statements. Agent Francar admitted that they asked to use the

phone; Wright wanted to let his wife and children know where he was, and Weech wanted his family to call a lawyer. Francar said that he removed their handcuffs one at a time and took them to the pay phone where he stood and listened as they spoke. He testified that they made certain statements in his presence. Both Wright and Weech had perviously been advised of their rights. Wright said that he wanted an attorney before he made any statements. Apparently, he then spoke to Agent Francar.

Agent Francar removed Wright's handcuffs, escorted him across the room to the telephone and stood right next to him and listened. According to Wright, he called his wife who was frightened and hysterical when he told her that he had been arrested. He said that it was a mix-up and she should not worry. The only opportunity that Wright had to make a phone call in *private* was some three days later, at F.C.I. in South Dade.

Next, Weech was taken to the phone. He called his parents' home and spoke with his brother Jim. According to Weech, he asked for his father and asked the family to get a lawyer. Agent Francar was standing next to Weech during the call. His next opportunity to make a call did not come until they arrived at the North Dade Detention Center at around 11:00 that night.

Francar testified that he heard Wright's telephone conversation in this way:

> In essence, Hon, I am not going to be home. Down in Islamorada. I have been running dope

> and have been caught. I am sorry . . . you know . . . those trips I have been making . . .

Francar testified that Weech said the following:

> Jim. Mike. They got me, man. I am at Islamorada. I'll be at the North Dade Detention.

When asked during trial whether he actually made a telephone call with a D.E.A. Agent standing next to him, and said that he had been running dope and got caught, Wright replied:

> . . . That is not accurate.

* * *

> No. With all due respect to everybody, a man would have to be lacking severely to make such a statement in front of an agent.

Francar did not advise Weech that he had a right to make a call in privacy. At the hearing the Court assumed the facts that Weech had asked to contact his family to get an attorney hours before he was finally allowed to call, and that there were a number of phones available for use in the Coast Guard station. However, the Court denied the Motion To Suppress and ruled:

> Even if there was any such thing as a constitutional right to make a phone call, Fourth Amendment right, and such right would certainly have been waived when the statement was made in the presence of the officer standing next to him.

When processing was completed, Wright and Weech were kept handcuffed while the officers had a barbeque. They were not given anything to eat, although they asked if they could eat too. They were told they would eat when they got to the North Dade Detention Center. They did not arrive there until between 11:00 and midnight.

In spite of the standard discovery order, and defendants' motion to compel compliance with the discovery rules, the Government withheld from the defendants three pieces of evidence which were favorable to the defendants and critical to their theory of defense: (1) evidence about the marina where the boat was towed and its mechanical condition when it got there; (2) evidence of the oil cans, tools and tool box on deck which would have been reflected on the inventory; and (3) evidence about the three men who ran away from the Cigarette boat and the "private source" who telephoned the Coast Guard about the speedboat on the sandbar.

There is a substantial likelihood that with this information the jury would have acquitted the defendants at trial and the defendants were found guilty.

REASONS FOR GRANTING THE WRIT

I.

THE GOVERNMENT'S FAILURE TO DISCLOSE TO THE DEFENDANTS FAVORABLE INFORMATION AVAILABLE ONLY TO THE GOVERNMENT VIOLATES THE MANDATE OF *BRADY V. MARYLAND*, AND THE DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS, WHERE THE THEORY OF DEFENSE WAS THAT DEFENDANTS WERE BROUGHT ABOARD THE BOAT TO MAKE REPAIRS, AND THE WITHHELD EVIDENCE WOULD SHOW THAT THERE WERE OIL CANS AND TOOLS ON DECK, THAT THE VESSEL HAD TO BE TOWED INTO DOCK AND THERE WERE THREE MEN SEEN RUNNING FROM ANOTHER BOAT, WHO COULD HAVE SUPPORTED THE THEORY OF DEFENSE.

The Government violated the pre-trial standing discovery order, and failed to disclose to defendants certain information which was criticial to their defense and would have been exculpatory and supportive of their theory of defense. Defendants' pre-trial motion to compel was denied, as were defendants' motions during trial for mistrial on these grounds. This was a close case. The jury was out for two days; the evidence against defendants were neither substantial nor compelling; the defendants presented a plausible, if not compelling defense. Were the defendants given the opportunity to present (1) evidence about the marina where the boat was towed, and its mechanical condition

when it got there; (2) evidence of the oil cans, tools and tool box on deck which would have been reflected on the inventory; and (3) evidence about the three men who ran away from the Cigarette boat, there is a substantial likelihood that the jury would have acquitted the defendants. This evidence was withheld from the defendants and they were found guilty.

In addition to filing a pre-trial motion to compel Government compliance with the standing discovery order, defense counsel made several motions for mistrial during trial based upon the Government's continued and blatant failure to meet its obligation to provide *Brady* and other important discoverable material to the defendants.

The evidence showed that Weech and Wright were present on a vessel, and 205 bales of marijuana were found inside the vessel. The two most incriminating pieces of evidence were a childlike drawing of a boat allegedly made by Wright, and the statement allegedly made by Wright that he had been caught running dope. It must have been difficult for the jury to believe that a person would knowingly make such a statement within earshot of a D.E.A. agent. The defendants presented a plausible defense, that they had been brought on board to repair the HAPPY DAYS. Evidently, the jury thought it was a close case. They deliberated for two days.

The exculpatory evidence which the Government failed to provide to the defense would have corroborated the defendants' theory of defense, and in all likelihood would have been just what the jury needed to hear to decide to acquit the defendants. First, the Government failed to make available the name and location of the

marina that towed the HAPPY DAYS away from the Islamorada Coast Guard base. The marina would, of course, be able to substantitate the testimony concerning the state of repair of the HAPPY DAYS, what had been done to it and what was wrong with it.

Third, the Government failed to make available to the defendants any information concerning the inventory taken by the customs property clerk, or an inventory of property seized on the HAPPY DAYS. This would of course, demonstrate the presence of empty oil cans and the tool box and tools on deck near the engine. All of these items would lead to defense testimony. The defendants would have used this evidence at trial.

The Government's failure to disclose information concerning the marina, the petty officer who received the report about the three men who ran away from the Cigarette, and the inventory of the boat deprived defendants of a fair trial and warrants a new trial. In *Brady v. Maryland*, 373 U.S. 83 (1963) the Court held that failure to disclose material evidence favorable to the defendant violates the due process clause and mandates reversal. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court recognized three types of situations in which *Brady* may be applied, and enumerated standards for determining materiality in each circumstance. First, where the prosecution knows or should know that the conviction is based on false testimony, a new trial is mandated if there is a reasonable likelihood that the false testimony could have affected the jury verdict. Second, if there is no disclosure of information despite a specific defense request, the test is whether the suppressed evidence might have affected the outcome of the trial. Finally, in the event of a general request

for *Brady* material or no request at all, a new trial is necessary if the omitted evidence, viewed in context of the entire record, creates a reasonable doubt that did not otherwise exist. The Fifth Circuit recognizes yet another circumstance in which Brady *applies:* when the prosecution fails to disclose purely impeaching evidence not affecting a substantive issue and there has been no specific defense request, relief will be granted if the defendant can demonstrate that the undisclosed evidence probably would result in an acquittal. *United States v. Mesa*, 660 F.2d 1070 (5th Cir., 1981).

The standard discovery order issued in the Southern District of Florida is intended to promote the policies underlying the discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure and *Brady* which bars the prosecution from suppressing requested evidence in the Government's possession that may be exculpatroy to the defense. *United States v. Campagnuolo*, 592 F.2d 852, 857 (5th Cir. 1979). *Brady* provides that due process forbids a prosecutor to suppress "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 87.

> Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.

United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), citing *Agurs, supra*. *Brady* has been interpreted to require that the Government

> . . . produce at the *appropriate time* requested evidence which is materially favorable to the accused either as direct or impeaching evidence.

Williams v. Dutton, 400 F.2d 797, 800 (5th Cir. 1968), emphasis supplied. In determining the "appropriate time" for discovery prior to trial, as stated in *United States v. Deutsch*, 373 F.Supp. 289, 290 (S.D. N.Y. 1974):

> It should be obvious to anyone involved with criminal trials that excuplatory information may come too late if it is only given at trial, and that the effective implementation of *Brady v. Maryland* must therefore require earlier production in at least some situations.

The constitutional requirement of due process mandates that the defendant has the right to a fair trial. The prosecution's duty not to suppress material information favorable to defendant flows from his office as representative of the Government's interest in and due process obligation to justice. See, *Agurs*, 427 U.S. 108-110.

In the instant case, there was neither overwhelming evidence, nor any attempt by the trial judge to rectify the prejudice suffered by the defendants for failure of the Government to comply with the standing discovery order. The court did not even make inquiry into the nondisclosure.

In *United States v. Gaston*, 608 F.2d 607, 613 (5th Cir. 1979), the request for disclosure of material was more than a blanket request, but rather a request for specific information. This case, like *Gaston*, is not the rare kind of case in which the uncontroverted evidence so conclusively establishes the guilt of the accused that it may be said that no matter what was contained in the undisclosed material it could not have affected the outcome of the case. Thus, it was error for the trial court not to have ordered the Government to produce requested information, or at least to have undertaken some investigation into the material and the Government's non-production of it. The *Brady* and *Agurs* cases ensure that the defendant has the means to conduct his defense and demonstrate to the jury that a reasonable doubt as to guilt exists.

> "Critical evidence", for purposes of the due process clause, is evidence that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction. When the defense makes a specific request for such evidence, the request should be granted. If only a general request is made, the higher standard of materiality announced in *Agurs* applies.

White v. Maggio, supra, 556 F.2d 1357-8. There can be no doubt that the evidence withheld from the defendants in this case was every bit as "critical" as the bullets in the second degree murder case in *White*. The suppression of that evidence requires reversal.

In *United States v. Phillips*, 585 F.2d 745 (5th Cir., 1978), the defendants sought discoverable information

which the Government failed to furnish. The Phillips panel strongly condemned the Government's failure to meet its obligation under the omnibus discovery order. Phillips' conviction was not reversed, however, because no prejudice was shown. The report which was sought was not exculpatory, but would have been harmful to defendant's case. 585 F.2d at 747. Below, the information could only have been exculpatory and in support of the theory of defense.

The jury deliberated for two days before reaching its verdict of guilty. The defendants presented a plausible defense to the charges. Had they been made aware of the information about the marina, the inventory of items found aboard the HAPPY DAYS and the petty officer who received the call about the Cigarette boat and the three men who ran away from it, the jury probably would have acquitted Weech and Wright. The Government violated the mandate of *Brady v. Maryland*, and deprived the defendants of their rights to due process and a fair trial in violation of the Fifth and Sixth Amendments of the Constitution. Certiorari should be granted on this issue.

II.

THE FAILURE TO ALLOW A PHONE CALL IN PRIVACY TO DEFENDANTS WHO WERE ARRESTED AND HELD INCOMMUNICADO FOR EIGHT HOURS, PREVENTED THEM FROM MAKING MEANINGFUL INITIAL CONTACT WITH THEIR FAMILIES OR ATTORNEYS, IN VIOLATION OF THEIR FIRST, FOURTH, FIFTH AND SIXTH AMENDMENT RIGHTS.

Agent Francar testified that Wright stated over the phone that he had been caught running dope, and that Weech stated, "They got me, man." Defendants' motions to suppress these statements were denied following an evidentiary hearing, and were renewed when the statements came into evidence before the jury.

The basis for the motion to suppress was that upon being arrested, a person has a right to make a phone call, and a right to privacy when he makes that call. The circumstances surrounding the calls showed that Weech and Wright were arrested at around 11:00 a.m. and were taken to the Coast Guard station at Islamorada. They asked many times to use the phone, but their requests were refused. Finally, hours later, after Agent Francar arrived, he processed them and then allowed them to use a pay phone one at a time. They had been in custody around eight hours at that point, and had asked 10 or 15 times to use the phone. Although, there were a number of phones located in the Coast Guard Station, and many in offices where a person could speak in privacy, Francar took them to a

pay phone and stood right next to Wright during his call, and right next to Weech during his.

The pre-trial motions to suppress the alleged statements contended that the statements were made in violation of the constitutionally guaranteed expectation of privacy. As authority, the defendants cited *Katz v. United States*, 389 U.S. 347 (1967).

> . . .What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

In *Katz*, defendant was overheard while using a public telephone. The Government argued that there was no expectation of privacy since he was out of doors at a public phone. The Court held to the contrary, that he did have an expectation of privacy in the phone booth. Since Weech and Wright were under arrest and thus entitled to make a phone call as a matter of right, they had a reasonable expectation of privacy notwithstanding the fact that they could not prevent Agent Francar from standing close enough to overhear the conversation. The conversation, whether to an attorney or family member, was privileged and not subject to eavesdropping.

The motion to suppress was raised during trial. An evidentiary hearing was held outside the presence of the jury. The defendants argued that they had the right to make a phone call to contact their families or an attorney within a reasonable time after arrest and with a reasonable expectation of privacy.

It was undisputed that Francar did not advise them that they had a right to make a telephone call in private. To the contrary, he stood right next to them as they spoke and overheard their conversations. Agent Francar made no special effort to move. He was standing there as they spoke. Francar said the reason he stood so close was that the prisoner "was not handcuffed and was not really under control." It is well to note that one handcuff was on a wrist, the other cuff was on a chair arm, and two other agents were sitting just on the other side of the room. It is also well to note that no-one else overheard the conversation, so there was no testimony offered in support of either of the defendants' testimony as to what they said, or Agent Francar's testimony of his version of their statements. Had Weech and Wright not made the calls at Islamorada when Francar allowed them to, they would have been held incommunicado for 12 hours before being allowed to make a call. They were arrested at around 10:30 a.m. and did not arrive at North Dade Detention Center until around 10:00 p.m. that night.

The Court has written that it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room. In prison, official surveillance has traditionally been the order of the day. However,

> even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.

Lanza v. New York, 370 U.S. 139, 144 (1962). *Lanza* held that electronic interception of a conversation between

defendant and his brother in jail did not violate the Fourth Amendment. The facts showed that he was convicted for refusing to answer questions before a state legislative committee, but some of the questions were not related to the intercepted conversation. His refusal to answer those questions supported the conviction.

The Court has also written, however, that police conduct must not deny fundamental fairness. *Betts v. Brady*, 316 U.S. 455, 462 (1942). The conduct of Agent Francar in this case is no more acceptable than surreptitious interrogation by eavesdropping in *Massiah v. United States*, 377 U.S. 201 (1964) or garnering an involuntary confession by use of illegal means in *Spano v. New York*, 360 U.S. 315 (1959).

The trial court found that even if there was a right to privacy, Weech and Wright waived it by speaking in the presence of Agent Francar. If there was a waiver, certainly it was not a voluntary waiver, considering the time period involved, the number of times defendants requested to use the phones, and the fact that it would have been at least another six hours until they could use another phone. They had such a long wait to make the first call, they had no idea when, or if, they could make another.

It is only reasonable that if man is making his first phone call after being arrested eight hours earlier, he will need to provide some explanation to his family or attorney over the phone. It necessarily follows that he should be able to make that explanation in private. Due to the emotional stress of being arrested and then detained for many hours, when Wright finally got to

talk to his wife, he had to tell her certain things, regardless of who may have been within earshot. Under these circumstances, making statements in the presence of Agent Francar, assuming the accuracy of Francar's version of the statements, cannot be considered to be a voluntary waiver of any right to privacy.

Weech and Wright were deprived of their First, Fifth and Sixth Amendment Rights. Accordingly, the motions to suppress should have been granted and defendants' convictions should have been reversed, and the case remanded for a new trial. Certiorari should be granted on this issue.

CONCLUSION

Constitutional error mandates reversal unless the Court is convinced that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). An error in a criminal case cannot be considered harmless where there is a reasonable possibility that the error might have contributed to the conviction. *United States v. Lay*, 644 F.2d 1087, 1090 (5th Cir., 1981).

The questions in this petition raise two substantial errors made by the trial court and approved by the appellate court which deprived the defendants of their rights to due process and to a fair trial as guaranteed by the Constitution. There can be no doubt that both of the errors contributed to the convictions.

Accordingly, for the foregoing reasons, defendants, Petitioners herein, respectfully pray that the Petition for Writ of Certorari to review the decision of the United States Court of Appeals, Eleventh Circuit, be granted.

Respectfully submitted,

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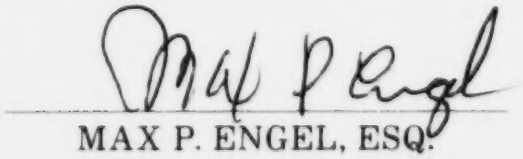
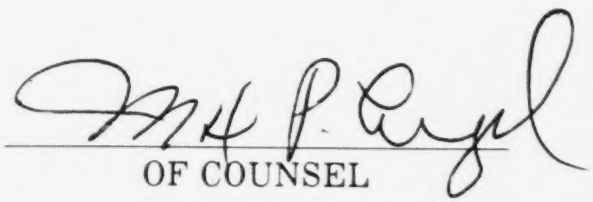


MAX P. ENGEL, ESQ.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to the Solicitor General's Office, Washington, D.C. this 9 day of June, 1983.



OF COUNSEL

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5565
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL EUGENE WEECH and
RICHARD VERNON WRIGHT,
Defendants-Appellants.

Appeal from the United State District Court
For the Southern District of Florida
(March 1, 1983)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

Michael Eugene Weech and Richard Vernon Wright were convicted of conspiracy to possess and possession with intent to distribute more than 1,000 pounds of marijuana. Collectively, they raise four points on appeal: (1) the evidence was insufficient to convict Weech; (2) the trial court erred in denying Weech's motion for severance; (3) the trial court erred in denying appellants' motions to suppress statements appellants made over the telephone in the presence of a federal law enforcement agent; and (4) appellants were denied valuable *Brady* material and should have been granted a mistrial.

None of these points has merit. The evidence of guilt as to both defendants was overwhelming and requires no discussion. Neither does the trial court's ruling on Weech's severance motion, as it was well within the court's discretion, or its rulings denying appellants' motions to suppress and for a mistrial (on the ground that the government improperly denied *Brady* and other discovery material).

The confictions are

AFFIRMED.

United States District Court

SOUTHERN DISTRICT OF FLORIDA

DEFENDANT: WEECH, MICHAEL EUGENE

82-50-CR-JWK

MAY 7 82

COUNSEL: [illegible] COUNSEL

X PRIVATE COUNSEL — MAX ENGEL, ESQ.

PLEA: [illegible] GUILTY [illegible] NOLO CONTENDERE NOT GUILTY

as charged in the indictment.

XXX — NOT GUILTY [illegible]

X GUILTY

7 MC-

FINDING AND JUDGMENT

Ct. 1 - Conspired to possess with intent to distribute (MARIJUANA), in violation of Title 21 U.S.C., Section 846.
Ct. 2 - Possessed with intent to distribute (MARIJUANA), in violation of Title 21 U.S.C., Section 841(a)(1) & Title 18 U.S.C., Section 2.

XXXXXXXXXXXXXXX

SENTENCE AND PROBATION ORDER

As to counts one and two, treatment and supervision pursuant to Title 18, U.S.C., Section 5010(b) until discharged by the United States Parole Commission as provided in Title 18, U.S.C., Section 5017(c). Count two to run concurrent with count one. It is further

ORDERED AND ADJUDGED that the defendant voluntarily surrender to the institution designated by the Bureau of Prisons on May 24, 1982 by 12:00 noon, for commencement of sentence imposed.

SPECIAL CONDITIONS OF PROBATION

(32)

[illegible]

MAY 12 1982

DEFENDANT } WRIGHT, RICHARD VERNON

82-50-CR-NM

MAY 7

COUNSEL

X WITH COUNSEL DAVID JAVITS, ESQ.

PLEA

X GUILTY as charged in the indictment.

XXXX GUILTY

FINDING & JUDGMENT

Ct. 1 - Conspired to possess with intent to distribute (MARIJUANA), in violation of Title 21 U.S.C., Section 846.

Ct. 2 - Possessed with intent to distribute (MARIJUANA), in violation of Title 21 U.S.C., Section 841(a)(1) & Title 18 U.S.C., Section 2.

FOUR (4) YEARS confinement as to Count 1. FOUR (4) YEARS confinement as to Count 2. Special Parole Term of THREE (3) YEARS as to Count 2 upon completion of sentence. Count 2 to run concurrent with Count 1. It is further

ORDERED AND ADJUDGED that the defendant voluntarily surrender to the institution designated by the Bureau of Prisons on May 24, 1982 at 12:00 noon, for commencement of sentence imposed.

SPECIAL CONDITIONS OF PROBATION

SIGNATURE OF J.

MAY 7, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 82-5565

MICHAEL EUGENE WEECH
and
RICHARD VERNON WRIGHT,
Appellants,

-versus-

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

PETITION FOR REHEARING BY THE PANEL

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TABLE OF AUTHORITIES

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Other Authorities Cited:

PETITION FOR REHEARING BY THE PANEL

Appellants, MICHAEL WEECH and RICHARD VERNON WRIGHT, through counsel and pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 26 of the Rules of the Eleventh Circuit, file this petition seeking a rehearing by the panel of the opinion in this cause, filed on March 1, 1983. As grounds for rehearing, Appellants contend that in summarily disposing of the four points raised in their brief, the panel has overlooked and filed to consider some important principles of caselaw and the application of those principles to the facts in the record below.

I

As their first point on appeal, Wright and Weech argued that they were denied a fair trial due to the Government's failure to disclose *Brady* material to them, either in a timely fashion or even tardily, to allow them to further demonstrate their theory of defense to the jury. The credibility question was a critical issue at trial, and the Government withheld essential information which would have enhanced defendants' credibility at trial.

The evidence showed that Wright and Weech were found on board a vessel which was loaded with marijuana. Weech and Wright had a plausible explanation for being found on board at that time and place. They presented that explanation to the jury.

The Government tried to show that Wright confessed. According to Agent Francar, when they were taken to the Coast Guard Station at Islamorada

and finally were allowed to use the telephone, Wright called his wife, with Francar standing right next to him, and other Government personnel nearby in the same room, and stated in the presence of them all,

> ". . . I have been running dope and have been caught . . . you know . . . those trips I have been making.

When Weech made his call, according to Francar, he said "they got me man." As Wright testified at trial, when asked whether he made such a statement with Agent Francar standing right next to him, he said,

> ". . . A man would have to be severely lacking to make such a statement in front of an agent."

Apparently, the jury agreed with Wright and did not really believe that anyone would make such a statement in the presence of an agent. It is well to remember that the jury did not immediately vote to convict the two defendants based upon this alleged confession by Wright. In fact the jury was in deliberation for *two days.* This was a close case. Just a little bit more on the defendants' side would have convinced the jury to acquit Wright and Weech. What little bit of evidence would have served that purpose?

Certainly, where the defendants' defense was that they were innocently on board the boat to repair it, had defendants been furnished with the identity and location of the marina that towed the boat away from the Coast Guard base and with the inventory of the property clerk showing that there were oil cans and

tools found on board the boat, this essential information would have resulted in an acquittal by the jury.

Wright is a trained marine mechanic. He was working on the engine of the vessel when he was arrested. He testified that his tools were on the deck and around the engine, and that there were oil cans on the deck. The inventory of property found on the vessel would have demonstrated to the jury that there were indeed, oil cans and tools on deck and around the engine. Most of the Coast Guardsmen who testified failed to remember seeing oil cans and tools. However, the inventory of property would have spoken for itself, and the testimony of a disinterested marina owner as to the existence of oil cans and tools, the state of repair of the engine and the necessity to tow the vessel because it was broken down and disabled would all have been very positive and worthwhile evidence for the defense to present.

The defendants' convictions should have been reversed for the Government's failure to disclose this important material, which was favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *United State v. Agurs*, 472 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Rehearing is warranted on this point.

II

As the second point on appeal, defendant Weech argued that the evidence was insufficient to convict him of either conspiracy or possession of marijuana. In affirming on this point, the panel overlooked and failed to consider the important precedent in this circuit in the cases of *United States v. Willis*, 639 F.2d 1335 (5th Cir. 1981) and *United States v. Bland*, 653 F.2d 989 (5th Cir. 1981). Those cases hold that mere presence on board a vessel is insufficient to sustain a conviction for conspiracy or to establish ownership, dominion and control of contraband on board the vessel.

All the Government showed here was that Weech was on board a vessel that contained drugs. The evidence showed that he was not alone. There was no evidence that Weech knew about the marijuana, that he had the ability to control and maintain it, or that he had entered into a conspiracy concerning the marijuana.

Accordingly, it is suggested that the panel reconsider Weech's convictions in light of the *Willis* and *Bland* decisions, supra. On rehearing, the conviction of Weech should be reversed with directions that he be discharged.

III

In Point III, defendant Weech argued that his motion for severance should have been granted where the evidence of his co-defendant's guilt was disproportionate to the evidence against Weech. This severely prejudiced Weech and deprived him of a fair trial.

In summarily affirming Weech's conviction, the Court has overlooked and failed to consider that the needs of justice dictated a severance in this case, *United States v. Martino*, 648 F.2d 367, 385 (5th Cir. 1981); and that the Constitution requires that the potential for the transfer of guilt in a joint trial be minimized to the greatest extent possible in order to individualize each defendant. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1293, 90 L.Ed. 1557 (1946). Weech's motion for severance should have been granted to avoid the overflow prejudice from the evidence against co-defendant Wright. Weech's "mere presence at the scene" would never have led to a conviction without the damaging evidence concerning his co-defendant.

On rehearing, Weech's conviction should be reversed with directions that he be granted a new trial.

IV

As their fourth point on appeal, Weech and Wright argued that the trial court's failure to suppress the statements they allegedly made in the presence of Agent Francar deprived them of their right to privacy and right to a fair trial.

In summarily affirming their convictions, the panel has overlooked and failed to consider that police conduct must not deny fundamental fairness. *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). Certainly, when a man is making his first telephone call after being arrested (some six hours earlier), he will need to provide some explanation to his family or attorney over the phone. He is entitled to make that call in privacy. Being forced to make their calls in the presence of, in fact standing right next to Agent Francar, or not call at all, cannot be considered any voluntary waiver of the right to privacy.

> . . . even in a jail or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.

Lanza v. New York, 370 U.S. 139, 144, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962).

On rehearing, the panel should recede from its prior opinion and reverse the defendants' convictions and remand to the trial court with directions that the statements be suppressed.

V

Wherefore, Michael Weech and Richard Wright respectfully pray that the Court will grant their Petition for Rehearing.

Respectfully submitted,

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By: /s/ MAX P. ENGEL
Max P. Engel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the Office of the United States Attorney, Attention: Michael Pasano, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130; on this 10 day of March, 1983.

By: /s/ MAX P. ENGEL
Of Counsel

[FILED APR 11, 1983]
Norman E. Zeller Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5565

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL EUGENE WEECH and
RICHARD VERNON WRIGHT,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
(April 11, 1983)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [illegible]
United States Circuit Judge

No. 82-2019

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL EUGENE WEECH AND
RICHARD VERNON WRIGHT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial on the ground that the government withheld material exculpatory evidence.

2. Whether the district court erred in refusing to suppress petitioners' statements made in telephone calls in the presence of a DEA agent.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2019

MICHAEL EUGENE WEECH AND
RICHARD VERNON WRIGHT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 701 F.2d 188.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. 14). The petition for a writ of certiorari was filed on June 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted of conspiracy to possess and possession with intent to distribute marijuana, in violation of 21 U.S.C. 846 and 841(a)(1). Petitioner Weech was sentenced to treatment

and supervision pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b), and petitioner Wright was sentenced to concurrent four-year terms of imprisonment, followed by a special parole term of three years (Pet. App. 3-4).

1. The evidence at trial showed that on January 21, 1982, petitioners, who were on the bridge of the Happy Days, a 48-foot sport fishing boat (1 Tr. 20, 70), were stopped by Coast Guard officers in United States waters near the Florida Keys. Petitioner Wright identified himself as the captain of the boat (1 Tr. 78-79). The odor of marijuana was strong aboard the vessel (1 Tr. 65, 87-88), and the officers found 205 bales of marijuana (totaling approximately 7,200 pounds) piled in the cabin (1 Tr. 22-23, 94, 96-97, 107). The officers also found electronic equipment on the vessel and a ship radio set to monitor the Coast Guard frequency (1 Tr. 20-22, 24). In addition, they found a bag containing clothing belonging to petitioner Wright among the marijuana bales on the Happy Days (1 Tr. 31).

At trial, petitioners objected to the introduction of statements they made during post-arrest telephone calls in the presence of a DEA agent. Following a mid-trial suppression hearing (2 Tr. 4-23), the trial court denied petitioners' motion to suppress. The court observed that even if there were a constitutional right to make a private telephone call, such a right would have been waived when the statements were made while the DEA agent was standing nearby (2 Tr. 23). The trial court also denied petitioners' motion for a mistrial based on the government's failure to make certain information available to the defense (2 Tr. 3).

2. The court of appeals affirmed in a per curiam opinion (Pet. App. 1-2). The court of appeals concluded that the evidence of guilt as to both petitioners was overwhelming; in addition, it concluded that the trial court acted well within its discretion in denying petitioner Weech's

severance motion and petitioners' motion to suppress and motion for a mistrial based on allegations that the government failed to disclose *Brady* information (Pet. App. 2).

ARGUMENT

1. Petitioners contend (Pet. 12-18) that the government withheld evidence that would have supported their defense at trial. That contention is without merit. The record shows that all the matters petitioners now raise were fully presented to the jury.

At trial petitioners attempted to present an innocent explanation for their presence on the boat with its cargo of marijuana. They testified that they boarded the Happy Days shortly before their arrest, at the behest of a Latin male and his two companions, in order to repair the engines (2 Tr. 92-103, 180-186). Petitioners explained that after they boarded the Happy Days the three original occupants offloaded packages onto a Cigarette speed boat and departed, leaving instructions with petitioner Wright to radio them if he were able to start the boat (2 Tr. 96-99, 182-183).

Petitioners first contend (Pet. 13-14) that the government withheld the name and location of the marina to which the Happy Days was towed. They claim that timely production of that information would have enabled them to track down leads to bolster their story that the boat was in poor running condition. It is unlikely that the name and location of the marina qualify as exculpatory evidence the government was required to disclose under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Even if petitioners had been informed of the name of the marina and, by pursuing that avenue of inquiry, established that the Happy Days was brought there needing substantial repair work, that evidence would not have suggested that petitioners were innocent. A mechanical breakdown would not be inconsistent with petitioners' knowing

use of the boat to carry marijuana. In addition, it does not appear that petitioners made a specific discovery request for the name and location of the marina (see 1 Tr. 4-11). Since the particular information the prosecution is now accused of withholding could not possibly have been recognized as exculpatory in the absence of a request by the defense indicating its potential relevance to the case, petitioners are plainly not entitled to relief on this ground; due process does not demand prosecutorial clairvoyance.[1] Moreover, a Coast Guard boatswain testified early in the trial that the boat was unable to proceed under its own power from the Coast Guard station to the marina (1 Tr. 36-37). Thus, evidence from the marina would have been cumulative at best and would not materially have advanced the defense case. See *United States* v. *D'Antignac*, 628 F.2d 428, 436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Robinson*, 585 F.2d 274, 281 (7th Cir. 1978) (en banc), cert. denied, 441 U.S. 947 (1979).

Petitioners also claim (Pet. 14) that the government failed to disclose information from an inventory of the boat's contents, which allegedly included oil cans, tools, and a toolbox, and thereby deprived petitioners of exculpatory evidence that would have supported their innocent explanation. Again, it is doubtful that such information, which apparently was not requested by the defense and the existence of which was presumably already known to petitioners, constitutes *Brady* material. The presence of tools and a toolbox on a boat is not an unusual occurrence (1 Tr. 37). In

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[1]Even if this were to be treated as a case in which prosecution files contained recognizably exculpatory but unrequested evidence, no relief would be warranted unless the undisclosed information would have created "a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 427 U.S. 97, 112 (1976); see also *United States* v. *Mangieri*, 694 F.2d 1270, 1288 (D.C. Cir. 1982). The *Agurs* standard plainly is not satisfied here.

any event, the jury was informed that oil cans and tools had been found on the boat. The Coast Guard boatswain testified that a toolbox and a few cans of oil were present on the boat when it was seized (1 Tr. 36-37, 53-54, 58-60).[2] Thus, as in the case of information about the marina, introduction of the inventory to establish the presence of tools or oil cans on the Happy Days would have provided only cumulative evidence.[3]

Finally, petitioners contend (Pet. 13, 14) that the government withheld evidence of a report that three men were seen running from a grounded Cigarette boat that was found to contain 84 bales of marijuana. They claim that the report would have substantiated their story about the three men who hired petitioners to repair the Happy Days and left on the Cigarette boat. However, government witnesses testified about the discovery of a Cigarette boat and its cargo of marijuana on a sandbar one or two miles from the Happy Days' position and the report of three men abandoning it (1 Tr. 35-36, 46, 60-64, 82-83, 109). Thus, evidence concerning that incident was not withheld from the jury or petitioners. Assuming arguendo that the report was *Brady* material, any theoretical pre-trial *Brady* violation is of no significance, because the evidence was presented at trial. See *United States* v. *Kopituk*, 690 F.2d 1289, 1339-1340

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[2]The boatswain also testified that the toolbox was closed and that he saw no indication that anyone had been working on the engines prior to the boarding (1 Tr. 59-60). In addition, photographs of petitioners taken after their arrest indicate that they did not appear unusually greasy or dirty as if they had been repairing engines (Gov't Exhs. 7-A, 7-B; see also Tr. 52, 143-145).

[3]Moreover, even if empty oil cans on the Happy Days would constitute exculpatory evidence, it is uncertain whether the inventory list would have included them. A DEA agent explained that Customs officers probably would have thrown the cans into a garbage bag, possibly without inventorying them (2 Tr. 59-60).

(11th Cir. 1982), cert. denied, Nos. 82-1530 and 82-1533 (May 16, 1983); *United States* v. *Kubiak*, 704 F.2d 1545, 1549-1550 (11th Cir. 1983); *United States* v. *Xheka*, 704 F.2d 974, 981 (7th Cir. 1983).

2. Petitioners further contend (Pet. 19-23) that they were deprived of a constitutional right to privacy by the introduction of statements they made during post-arrest telephone calls at a Coast Guard station in the presence of a DEA agent. Petitioner Wright called his wife and told her that he had "been running dope" and had been caught (2 Tr. 39-40), and petitioner Weech told the person he called that "they got me" (2 Tr. 41). Petitioners made these statements in the course of talking on pay telephones in a public area, while a DEA agent was standing openly next to them.

Petitioners claim that after they had been in custody "around eight hours" (Pet. 19), the DEA agent deliberately denied them the use of a private telephone and made them use a public pay telephone in his presence.[4] The agent allowed petitioners to use the pay telephone as an alternative to the normal DEA practice of allowing a telephone call only after an individual has been taken to Miami (1 Tr. 116). The agent testified that he stood close to petitioners for security reasons (2 Tr. 16, 20-21). The record shows that petitioners did not seek leave to telephone their attorneys or to make a call in private (2 Tr. 4).

Petitioners' claim that they had a constitutional right to make their telephone calls in private is without merit. Although the Constitution may prohibit surreptitious eavesdropping in certain circumstances or intrusion into a prisoner's relationship with his attorney (neither of which occurred here), it does not require that a prisoner be

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[4]In fact, petitioners had been in custody "five or six hours" following their arrest at sea (1 Tr. 38, 44; 2 Tr. 17, 138).

afforded a private telephone call to a spouse or friend during post-arrest processing. Moreover, petitioners did not have any reasonable expectation of privacy in the contents of telephone conversations carried on when a law enforcement officer was standing an arm's length away. See *United States* v. *Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); cf. *United States* v. *Congote*, 656 F.2d 971, 976 (5th Cir. 1981). The agent was not hidden; in fact, petitioner Wright testified that he was handcuffed to the agent during the telephone call and that he knew the agent could hear every word he said (2 Tr. 109, 211).[5] Under those circumstances, it is clear that petitioners' admissions are not constitutionally protected from evidentiary use.[6]

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[5]Because the agent's presence was obvious, petitioners' reliance on *Katz* v. *United States*, 389 U.S. 347 (1967), is misplaced. As petitioners acknowledge (Pet. 20), *Katz* holds that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." 389 U.S. at 351. Nor is the situation in this case comparable to the electronic eavesdropping in *Lanza* v. *New York*, 370 U.S. 139 (1962), or the surreptitious post-indictment interrogation in *Massiah* v. *United States*, 377 U.S. 201 (1964).

[6]Petitioners' suggestion (Pet. 22) that their "waiver" of an expectation of privacy was involuntary is frivolous. Their inculpatory admissions were not coerced by government action, nor was their will overborne by the conditions or the period of detention necessary for post-arrest processing. Petitioners were free to explain in the telephone calls that they had been arrested, without admitting or implying their guilt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

SEPTEMBER 1983

DOJ-1983-09